Fund Finance

2019

Third Edition

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GLOBAL LEGAL INSIGHTS - FUND FINANCE

2019, THIRD EDITION

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We are extremely grateful for all contributions to this edition.
Special thanks are reserved for Michael C. Mascia for all his assistance.

Published by Global Legal Group Ltd.
59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 207 367 0720 / URL: www.glgroup.co.uk

ISBN 978-1-912509-57-7
ISSN 2399-1887

Printed and bound by CPI Group (UK) Ltd, Croydon, CR0 4YY
February 2019

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PREFACE

We are pleased to present the third edition of *Global Legal Insights – Fund Finance* at such an active and evolving time in the fund finance market. Cadwalader, Wickersham & Taft LLP is pleased to serve as the contributing editor.

Boring is beautiful, as the market adage goes, and in many ways that was the case in the fund finance deal market in 2018. Investor fundraising was robust, thus driving the continued prolonged expansion of lender portfolios. Market participants were forever busy. Deal terms stayed remarkably consistent, with the Institutional Limited Partners Association 2017 Guidelines fading in the rear view mirror without meaningfully impacting the market. With one high-profile exception, realized credit performance remained clean, in what has become the groove for the fund finance market.

Yet, there was plenty to talk about in 2018. The Abraaj Holdings insolvency has headlined the conversation and become a closely followed test case in the press for capital calls and lender remedies. We expect this matter to be of ongoing relevance in 2019 as further facts come to light and the parties involved move forward. Bank hiring has been, and continues to be, robust. Many high-profile fund finance bankers switched firms in 2018 and banks hired aggressively at the junior ranks. And new banks and law firms seek to enter the space all the time, some even making major investments with large staff additions. It is fun to check LinkedIn and see who changed jobs or got a promotion each week. Our industry is growing rapidly.

Fund sponsors are increasingly creating customized solutions for their investors, optimizing fund and investment structures. Funds of one, BDCs, and hedge funds with committed capital overlays, are all increasingly relevant in the fund finance market. Lenders and counsel are focused on adapting financing solutions to these ever-evolving needs of funds. Those diligent efforts make up the subject of this book.

This book is designed to provide financial institutions, private equity fund sponsors, law firms and investors with a comprehensive review of the market and legal developments in a single volume. As with its predecessors, this book commences with 20 product-oriented chapters, which are designed to provide an in-depth look at specific products and market issues. It then follows with 22 jurisdiction-specific updates.

In producing this edition, we have gathered the views and opinions of the leading legal practitioners from around the world. The participating authors were asked to provide analysis on the most important trends and recent developments in the subscription credit facility and related fund finance markets, in each case with an eye towards depth, specificity and evolution. We are very pleased with the end product; the quality of the submissions increases each year. A sincere thank you to all of the authors and their firms for their contributions.

My sincere thanks to publisher Rory Smith and the rest of the terrific team at Global Legal Group Ltd. I appreciate your continuing support to the fund finance market and the publishing of this edition. You are fantastic. Both Rory and I would love feedback on how we can improve future editions of this book.

Michael C. Mascia
Cadwalader, Wickersham & Taft LLP

INTRODUCTION

Dear Industry Colleagues,

On behalf of the Board of Directors of the Fund Finance Association (the "FFA"), I would like to thank and applaud the Global Legal Group for their support and effort publishing this third edition of *Global Legal Insights – Fund Finance*. They have brought together the preeminent law firms across the globe, providing a virtual world-wide Fund Finance legal and market update in a single volume. The FFA was pleased to contribute to the publication and hope you find the edition helpful and interesting.

The invitation to participate in this publication was well received by the world's leading law firms, which validates the continued growth and interest in the subscription credit facility and related fund finance markets worldwide. We thank all of the contributors for their time and expertise.

The FFA is a non-profit industry association supporting the fund finance markets. As part of our core mission, we strive to create educational events and information availability to market participants. This publication is well aligned with our mission.

Our next event is the 9th Annual Global Fund Finance Symposium on March 24-26, 2018 at the Fontainebleau Hotel in Miami. We hope you can join us. For information on sponsorship or attendance, please email info@fundfinanceassociation.com or visit our website at www.fundfinanceassociation.com. Later in the year, the 5th Annual European Fund Finance Symposium is set to take place in London on June 20th, and the 3rd Annual Asia-Pacific Fund Finance Symposium follows in Hong Kong on September 24th. We also have a host of other events in the planning stages with our Women in Fund Finance, Next Generation and Diversity initiatives. More details on these and other upcoming events are available on our website.

The FFA is always looking for ways to improve and better serve the industry. If you have suggestions, please feel free to reach out to me or any other member of the Board of Directors.

Sincerely,

Jeff Johnston

Chairman, Fund Finance Association

Fund finance lending: A practical checklist

James Heinicke, David Nelson & Fabien Debroise
Ogier

Introduction

In this chapter we have tried to set out some of the key issues that a lender and its counsel need to consider when entering into a typical subscription (or capital call) finance transaction.

We have looked at these issues from the perspective of a lender and as its offshore legal counsel. In other words, we have assumed that the fund has been formed in an offshore jurisdiction, such as the Cayman Islands, Luxembourg, Jersey, Guernsey or the British Virgin Islands, and have set out some of the issues that will be relevant for a lender in order to establish that:

- the fund has the capacity to enter into the transaction and perform its obligations thereunder;
- the fund has performed the steps necessary to enable it to enter into the transaction and to ensure the transaction and the relevant finance documents are binding on it;
- the relevant finance documents are enforceable against the fund as a matter of the laws of the jurisdiction in which the fund is formed;
- the transaction and the fund's obligations under the relevant finance documents will not conflict with the fund's constitutional documents or the law of its jurisdiction of formation; and
- all security granted over the assets of the fund in relation to the transaction is first-ranking and properly perfected.

The issues outlined in this chapter are not intended to be an exhaustive list. In particular, there will be jurisdictional and deal-specific issues that will need to be considered and dealt with. Nor is this a substitute for legal advice. Lenders and funds would be well advised to seek the advice of their legal counsel at the outset of any transaction to ensure these matters are properly addressed on a deal-by-deal basis.

The fund structure

Framework of the fund and its investment structure

Of course, where the fund (and, if applicable, its general partner) is domiciled will determine: (i) the relevant legislative framework that underpins the fund; and (ii) which offshore legal counsel (if any) will need to be involved in the transaction. This will therefore be a primary point for the lender (or its lead counsel) to establish.

However, prior to undertaking a detailed legal analysis of the fund and its constitutional documents, it is important for the lender to understand the fund framework and the way in

which the investors' capital commitments are contributed to the fund. The significance of understanding the fund framework is increasingly important, as fund structures become more complex and bespoke. The fund framework will likely influence a lender's analysis on the scope of the obligor net and the security required in order to ensure there is no leakage of value out of the lender's recourse structure. Some relevant considerations will be:

- Does the fund have any feeder fund vehicles that invest into the fund? The value of, and potential recourse to, the ultimate investors' uncalled capital commitments needs to be understood and the lender may wish to consider making any such feeder fund an obligor under the facility, and requesting that the feeder fund grants security over the uncalled capital commitments of the investors in the feeder fund and the right the feeder fund has (or the right the feeder fund's general partner has) to make capital calls on those investors.
- Does the fund have any parallel funds? Generally, parallel funds invest and divest in the same investments as the main fund, at the same time and on the same terms.
- Does the fund have any alternative investment vehicles (**AIVs**)? It may be advantageous for a fund to establish AIVs to hold certain investments for tax, regulatory or other reasons. In such circumstances, a portion of an investor's capital commitment may be invested in the AIV (thereby reducing the investor's capital commitment in the main fund).
- Does the fund have any co-investment vehicles?
  If the fund has parallel funds, AIVs or co-investment vehicles, the lender may wish to treat them in the same way as suggested for feeder funds above. Alternatively if no parallel funds, AIVs or co-investment vehicles have yet been established, but if the fund has the right to establish them in the future under the fund's constitutional documents, the lender may wish to include a restriction in the subscription line facility agreement prohibiting their establishment unless: (i) the lender provides prior written consent; and/or (ii) those vehicles become obligors and grant capital call and account security upon their establishment.

These points will also be relevant from a capacity and due authorisation perspective, as any such feeder funds or alternative investment entities that are introduced into the obligor group will need to be diligenced by the lender in the same way as the main fund. Whilst it may therefore be possible that the obligor group extends to other entities in the fund group, for simplicity, we have discussed various points in this chapter by reference to the fund (and, where relevant, its general partner) only, on the assumption that the fund (and, if applicable, its general partner) is the only obligor and security provider.

Legal personality of the fund entity

In addition to the fund structure, it is important for the lender to understand the legal personality of the fund and any other relevant entities in the fund group and, if relevant, any regulatory regime applicable to them. The type of legal personality will determine the relevant steps and processes that the fund will need to complete to ensure that it has the capacity and authority to enter into the transaction. For example, some relevant questions will be:

- Is the fund structured as a limited partnership, a company, a limited liability company or some other legal entity?
- Is the fund structured as a regulated investment vehicle? Depending on the type of investment vehicle, certain regulatory restrictions on fund borrowing (e.g. bridge loans only) or on the ability of the fund to grant security or guarantees, may apply.

- Does the fund fall within the scope of the EU Alternative Investment Fund Managers Directive? In certain circumstances, Luxembourg collective investment undertakings which do no not qualify as UCITS (hereinafter referred to as a **Luxembourg AIF**) must appoint an alternative investment fund manager (**AIFM**), and a Luxembourg AIF's financial instruments are required to be held in custody with a Luxembourg-based depositary. As mentioned below, this can have implications for a subscription line facility.
- To put legal personality into context – if, for example, the fund is established as a Cayman Islands exempted limited partnership or a Luxembourg limited partnership, it must have a general partner (and it may have a series of intermediate general partners). It will be important to understand which entity is the ultimate general partner. Neither a Cayman Islands exempted limited partnership nor a Luxembourg limited partnership has separate legal capacity – they both enter into documents through their general partner, which undertakes the conduct of the fund's business and has unlimited liability such that, in the event that the assets of the fund are inadequate, the general partner is liable for all of the debts and obligations of the fund.

Any delegated authority or investment committee

The type of legal personality of the fund will, in its relevant jurisdiction, largely dictate the steps that the fund is required to take to ensure it has capacity to enter into, and has properly approved and authorised its entry into, the transaction. However, the lender will need to be aware of other points that may influence this. Some relevant points include:

- Has the fund established an investment committee which needs to provide consent to the transaction? Some funds establish committees which, in addition to usual board/management approval, are required to approve certain business activities of the fund. Sometimes this may include incurring indebtedness (particularly incurring indebtedness above certain agreed parameters set out in the fund's constitutional documents).
- Is there an investment or portfolio management agreement or investment advisory agreement in place? If there is, has the ability to issue capital calls of the fund been delegated by the fund and/or the general partner to the investment manager, the AIFM or the investment advisor? If so, any relevant approvals should be obtained from the investment manager, the AIFM or the investment advisor to ensure the transaction is duly authorised, and consideration may also need to be given as to whether the investment manager, the AIFM or the investment advisor ought to be party to the subscription line facility agreement and grant security over its right, title and interest to issue capital calls on investors.
- Since a Luxembourg AIF's financial instruments must be held in custody with a Luxembourg-based depositary, consideration ought to be given as to whether any approval of the depositary is required. The depositary agreement may require that the fund notify or obtain approval from the depositary in order for the fund to enter into the finance documents.

Due diligence

As a general point, a large part of a lender's due diligence analysis will likely be focused on an assessment of the identity and credit quality of each investor in the fund. This will allow the lender to establish which investors will be included in the borrowing base calculation and then set the borrowing base at the appropriate level.[1]

However, to ensure that the financing and the fund's obligations under the relevant finance documents will not conflict with the law of its jurisdiction of formation or, more pertinently, with the constitutional documents of the fund and (if any) its general partner, a detailed documentation review and analysis should be undertaken. We set out below some of the key documentary due diligence points a lender and its counsel should consider when reviewing a LPA, investor subscription documents and related side letters.

Deconstructing the LPA

Some key points a lender should consider in the LPA in order to determine if the proposed subscription line financing transaction does not conflict with (or, indeed, is not prejudiced by) the terms thereof, are:

- *Is borrowing/indebtedness permitted?*

  The LPA should specifically permit the fund to incur indebtedness (be that borrowing or guaranteeing obligations of an affiliate fund or portfolio company, should the financing structure require) and any limitations on the amount or term of such indebtedness should be noted. The lender will need to be aware of any such limitations on amount or term when agreeing the parameters of these in the subscription line facility agreement.

- *What are the mechanics for capital call notices?*

  The provisions setting out how capital can be called (including the notice provisions and time frame for payment by investors) and the purpose for which the general partner is permitted to issue capital call notices to the investors need to be understood: specifically, whether the LPA permits capital call notices to be issued in order to repay principal debt, interest accrued thereon and costs related thereto is a relevant consideration, as is whether the LPA makes it clear how the total amount specified in a capital call notice issued in order to fund the repayment of indebtedness would be allocated among the investors.

- *Is the fund permitted to grant security over the investors' uncalled capital commitments, the right to make capital calls and its assets generally?*

  It should be checked that under the LPA, the fund is permitted to grant security over these assets. If the LPA (or any side letter (see below)) designates any investor as a confidential investor, whose identity cannot be disclosed or in relation to whom capital call rights cannot be assigned, these investors will likely be excluded from the borrowing base.

  In certain circumstances, in particular for tax, regulatory or ERISA reasons, a feeder fund may be prohibited from guaranteeing and directly granting security to a lender to support the main fund's obligations under a subscription facility. In such circumstances, a cascading pledge, where the feeder fund grants security over its investors' uncalled capital commitments to the fund borrower, which, in turn grants security to the lender over its rights under the security granted to it by the feeder fund (in addition to the fund borrower granting security over its rights to receive and call for the uncalled capital commitments of its investors, including the feeder fund), may have to be considered.

  The LPA should also be checked to establish whether the LPA permits (or at least does not prohibit and permits by way of the general powers) the limited partners paying capital contributions into a specific bank account over which the lender under the subscription line facility agreement takes a security interest.

- *What is the term of the fund?*

  This should be considered in light of the proposed maturity date of the subscription line facility. Given that, under the LPA, the fund will be dissolved at the end of its term, the lender should ensure that the maturity date of their subscription line facility falls within the term of the fund.

- *In what circumstances may the fund be terminated and dissolved prior to the end of the term?*

  The applicable law of the relevant jurisdiction in which the fund is domiciled will likely set out how a fund is to be terminated and the circumstances that result in such termination. For example, in the context of a Cayman Islands exempted limited partnership, Cayman Islands law states a fund may be voluntarily wound up at the time or on the occurrence of the events specified in the LPA, or otherwise upon the passing of a resolution by all of the general partners of the fund and not less than two-thirds of its limited partners. Similarly, Luxembourg limited partnerships can be liquidated if so resolved by limited partners representing three-quarters of the partnership's interests, unless otherwise provided in the LPA. The LPA may modify the starting position at law (to the extent permitted in the relevant jurisdiction) and will usually also set out other additional early termination events. The LPA will typically provide a contractual "waterfall" for distribution of the fund's assets upon its liquidation, and it should be established whether creditors of the fund are at the top of this waterfall.

- *What is the investment / commitment period and in what circumstances may it be suspended or terminated?*

  The right of the general partner to call capital from investors will likely be restricted upon expiry or suspension of the investment / commitment period. Examples of potential termination / suspension events are: expiry of the investment / commitment period, occurrence of a key person event and removal of the general partner for cause. It should be established whether, notwithstanding such restrictions, capital may still be called from investors after termination or suspension of the investment / commitment period in order to fund repayment of the principal outstanding under the subscription line facility and related accrued interest and costs.

- *Are there overcall provisions in the LPA for any defaulting investor or excused investor?*

  These are provisions that mean if an investor has defaulted or is excused from making a capital contribution to fund certain investments, the fund is permitted to call capital from the non-defaulting / non-excused investors up to the amount of such non-defaulting / non-excused investors' unfunded capital commitments. Often, the overcall obligations of other investors are capped under the LPA. For example, they may be limited to the lesser of the relevant investor's unfunded capital commitments and a certain percentage of its total capital contribution. Any such limitation should be noted. It is usual for any defaulting investors to be excluded from the borrowing base.

  The excuse provisions in the LPA should be checked to understand whether the capital commitment of an investor that is excused or opts out from making a capital contribution to fund a certain investment would remain unaffected (and so available) for the purposes of repayment of the principal outstanding under the subscription line facility and related accrued interest and costs.

- *Recallable distributions*

  It should be ascertained whether, under the LPA, the general partner has the ability to

"recall" distributions that have been made to investors and, if it does, what the limitations and terms of the recall are. The relevant considerations for a lender are likely to be: whether these distributed and recallable amounts increase the amount of the unused capital commitment of the relevant investor; and whether these distributed and recallable amounts will be available for recall to allow the fund to repay principal, accrued interest and other costs in respect of the subscription line facility (including in circumstances where the investment / commitment period has been suspended or terminated). If such distributed and recallable amounts are not so available, a lender may consider excluding these amounts from the borrowing base.

- *Transfer provisions – limited partners and general partner*

  The transfer provisions in the LPA should be reviewed to understand in what circumstances an investor may transfer its interest in the fund, grant security over its interest in the fund or withdraw as a limited partner in the fund and, for example, whether prior consent of the general partner is required. As noted above, the identity of the investors in the fund will be an important consideration for a lender in its credit evaluation and in setting the borrowing base level. Changes to the identity of a limited partner may also have know-your-customer and compliance issues for a lender.

  The circumstances in which a general partner may transfer its general partner interest in the fund (and whether this needs a certain percentage of investors to give prior consent) or in which the general partner may be removed or replaced (with or without cause) should also be checked. The identity of the general partner will also likely be important to the lender and any change is likely to trigger a repayment event under the subscription line facility.

  Where these events will cause the investment / commitment period to be suspended or terminated, as mentioned above, it should be established whether capital calls may still be made to repay principal, accrued interest and costs of the subscription line facility during such suspension or after such termination (as the case may be).

- *Are there any key person events under the LPA?*

  The LPA may name certain key persons who must dedicate a certain amount of their time to the fund during the investment period and / or term of the fund. If any such specified key persons fail to do so, this may be a "key person event" under the LPA. The occurrence of a key person event may cause the investment / commitment period to be suspended or terminated. If this is the case, it should be checked whether capital calls may still be made to repay principal, accrued interest and costs of the subscription line facility during such suspension or after such termination (as the case may be).

Side letters

Side letters are covered in detail in another chapter of this publication, so we do not intend to cover side letters in any great detail but, given their potential impact on a subscription line facility, they need to be mentioned.

The terms of any side letters should be reviewed to confirm the absence of provisions that adversely affect any of the findings arising from the LPA due diligence review or any factors that would otherwise conflict with the obligations of the fund or could potentially prejudice the rights of the lender under the subscription line facility or its related security.

For example, we have seen a number of instances where side letters have expressly prohibited the fund from granting a security interest over a particular investor's uncalled capital commitment.

Some additional points to be considered when reviewing side letters are:

- Note any MFN ("most favoured nation") provisions. These provisions give an investor (the "subject investor") the right to select that it will get the benefit of provisions that another investor has the benefit of, and that are better terms than the terms that would otherwise apply to the subject investor. There are sometimes parameters to the exercise by the subject investor of its MFN right. For example, it may need to exercise its MFN right within a certain time period, or the subject investor's MFN right may require it to accept a group of provisions that another investor has the benefit of relating to a certain issue, and prevent the subject investor from "cherry-picking" only certain of those provisions.
- Note any provisions which modify the transfer provisions in the LPA.
- Note any confidentiality / confidential investor provisions.
- Note any sovereign immunity provisions. It is not unusual for institutional investors to be connected to the state (for example, public body pension funds and sovereign wealth funds may make up part of the investor base in a fund). These entities may have sovereign immunity protection by nature of their connection with the state, under certain jurisdictions. The relevant investor may wish to reserve these sovereign immunity protections in a side letter, in line with its internal investment policy or other considerations. The impact of any sovereign immunity on the requirement for the relevant investor to comply with capital calls should be considered.

Security

Another important element that a lender and its offshore counsel need to consider when entering into a fund finance transaction relates to the security package. Generally, subscription line facilities are secured against the uncalled capital commitments of the investors in the fund including: (i) the right to make capital calls on investors in respect of their uncalled capital commitments, together with rights to enforce payments of them; and (ii) the right to receive the proceeds of such capital calls. It will generally also include security over the bank account into which investors are required to deposit their capital contributions. The type of security to be created over the capital commitments will be a factor of the legal regime in the jurisdiction of formation of the fund and the governing law of the relevant security document.

For example, in the case of a Cayman Islands exempted limited partnership, where the security is governed by the laws of the Cayman Islands, the security over the right to make capital calls and the right to receive proceeds of capital contributions will technically be granted by way of an assignment by way of security by the fund (acting through its general partner) of those rights as they arise under the fund's Cayman Islands law governed LPA and any applicable investor subscription documents. For Luxembourg funds the security package is the same, albeit that its legal characterisation is that of a 'pledge' rather than an assignment by way of security.

Prior security

It will be important for the lender to establish whether there is any existing security over the capital call rights and the capital call account they intend to take security over. Given the size of some fund structures, it is not uncommon for certain assets within the fund structure to be subject to existing security in favour of third parties. Clearly to the extent that there is any existing security, this will need to be considered to determine if it will prejudice the lender's position. The following ought to be considered:

- Can any security or lien searches be carried out to determine the extent of any existing security? For example, in the case of a Cayman Islands fund, there is no public register of security interests in the Cayman Islands, but the Register of Mortgages and Charges of the fund's general partner (if the general partner is a Cayman Islands company) should be obtained and inspected to establish whether any security interests have been granted by the fund over its assets (although this will not be conclusive evidence of the granting of any security, since the entry in the Register of Mortgages and Charges is an internal register only and making an entry in it does not affect validity or priority of the security). Similarly, in Luxembourg, except with respect to real estate, there is also no publicly available record of pledges or other security interests granted by a Luxembourg entity.
- To the extent that there is any prior security (over any assets), those security documents ought to be reviewed to determine the scope of the security and any applicable negative pledges contained within the security documents (and whether those negative pledges just pertain to the assets secured under that security document or to all the assets of the fund).
- If the fund is a Luxembourg AIF, its financial instruments must be held in custody with a Luxembourg-based depositary. A release from the depositary may be required in circumstances where the terms of the depositary agreement provide the depositary with a security interest over the bank account into which investors' capital commitments are deposited.
- If there is any existing financing to an investment manager of the fund, the investment manager may have granted security over its right to receive its management fee. Often, the terms of a subscription line facility agreement will seek to subordinate payment of any management fee to the manager following the occurrence of an event of default under the subscription facility. This may be incompatible with any such existing financing to the investment manager.
- Have any investors granted security over their limited partnership interests in the fund? If the fund is formed in the Cayman Islands, this ought to be established by reviewing the Register of Security Interests of the fund. If so, the implications of such security would need to be considered and such investor may need to be excluded from the borrowing base. There is no equivalent Register of Security Interests for Luxembourg funds so, in those instances, the lender will simply have to rely on the relevant representations and warranties given by the fund and/or its general partner in the finance documents.

Priority/perfection of security

A fund finance lender will want to ensure that if the fund defaults on any of its obligations under the subscription line facility agreement or becomes insolvent, the lender's security interests will constitute first ranking and enforceable security interests over the relevant assets of the fund, such that the lender could enforce its security and apply the enforcement proceeds in satisfaction of the obligations that the fund owes to the lender, in priority to the fund's other creditors.

In order to ensure this, the lender should consider at the outset how its collateral is perfected and how it ensures its priority against third parties. The relevant steps that need to be taken will largely depend upon the jurisdiction of formation of the fund (and its general partner), the location or *lex situs* of the collateral, and the nature of the collateral (as mentioned above, for a subscription facility the collateral will usually be security over the uncalled capital commitments of investors and security over the bank account into which the capital commitments are deposited). Some issues the lender should consider are:

- Are any security registrations required in the jurisdiction in which the fund or its general partner are formed (either on a public register or on internal registers)?
- If security registrations are needed, when should the registrations be made and are there any time periods within which the registrations need to be made?
- What other perfection or priority steps need to be completed?
- What are the implications and risks to the lender of not making the security registrations and/or taking the other perfection or priority steps?
- How can the lender ensure that its security ranks in priority to other creditors of the fund?
- Does notice of the security over the uncalled capital commitments need to be given to the investors for perfection or priority purposes? If notice does need to be given, consider:
  - What form does the notice need to take?
  - When does the notice need to be given?
  - How is notice to be delivered (for example, is there any procedure for delivery that must be followed under the fund's constitutional documents)?
  - Are any acknowledgements required from the investors?
  - What evidence of delivery of the notices should be obtained from the fund?

Enforcement of security

Another crucial point for fund finance lenders is to know how the security interests over the uncalled capital commitments of investors (and the fund's accounts) will be enforced in case of the occurrence of an event of default under the subscription line facility agreement, and in particular, on the fund's and/or general partner's insolvency. Key points to consider will be:

- Will any power of attorney issued in favour of a lender/security agent to issue capital calls survive the fund's/general partner's insolvency?
- Can the lender/security agent exercise any remedies by stepping into the shoes of the general partner and call capital from all investors?
- Should the capital calls made on enforcement be carried out on a *pro rata* basis, pursuant to the provisions of the fund's constitutional documents and the relevant subscription documents, taking into account any existing investor excuse rights under the LPA?

Document execution

Proper execution of the relevant finance documents is also a key component to ensure that the finance documents are enforceable against the fund and/or its general partner. Generally, the lender's lead counsel will be responsible for ensuring that the finance documents are enforceable as a matter of the laws which govern them (unless, in the case of any security documents, these are governed by the law of the jurisdiction of formation of the fund, in which case the lender's offshore counsel will undertake this task with respect to those security documents). Offshore counsel's input will be needed to ensure that the finance documents are compatible with the laws of the jurisdiction of formation of the fund. The lender's offshore counsel will also check that the documents have been executed in accordance with the laws of the jurisdiction in which the fund is formed, the constitutional documents of the fund and the relevant corporate authorisations. The following ought to be considered:

- Certain jurisdictions may have jurisdictional specific requirements for execution. Is there any particular form that the execution blocks need to take? Are there any witnessing and/or notarisation requirements?
- Who is signing on behalf of the fund and/or general partner?
- Have the responsible officers that are signing on behalf of the fund and/or general partner been authorised in corporate authorities of the general partner?
- Have such corporate authorisations been validly passed?
- If the investment manager, the AIFM or the investment advisor is signing on behalf of the fund and/or general partner, is such delegation is valid?

Conclusion

The above outlines some of the structural, legal and practical considerations that lenders and their counsel ought to consider when advising on a subscription facility. As we have mentioned, this is by no means an exhaustive list and there will be many deal-specific issues that arise which will need to be considered on a case-by-case basis. However, what the content in this chapter does is illustrate the myriad of issues that lenders and their (offshore) counsel need to think about when structuring and documenting a subscription facility in order to ensure that the lender's position is protected.

* * *

Endnote

1. The "borrowing base" broadly caps the amount that may be outstanding under the subscription line facility at any time (together with hedging exposure and non-cash backed letters of credit) to the lesser of: (a) the available commitments under the facility; and (b) the aggregate of the uncalled capital commitments of each eligible investor as multiplied by a specified advance rate which is attributed to that investor, based on its credit quality. Only "eligible" investors to which the lender attributes a certain credit score will be included in the borrowing base calculations, with other investors in the fund being "excluded" investors whose capital commitments do not form part of the borrowing base or only being included (and then at a lower advance rate) if they meet certain additional information and due diligence requirements.

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James is a partner in Ogier's banking and finance team in the Cayman Islands, and has significant experience advising on a wide range of banking, finance and corporate transactions.

James has a particular focus on all types of fund financing matters and is the global head of Ogier's Fund Finance Practice. He regularly advises both lenders and sponsors on subscription and capital call financings. He also has extensive experience advising clients on fund-of-fund facilities, NAV and hybrid facilities, GP and management credit lines and portfolio company loans.

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David Nelson has extensive experience advising on the BVI and Cayman law aspects of a broad range of debt financing transactions, including leveraged and acquisition finance, fund finance, margin lending, structured finance, real estate finance, and secured and unsecured general corporate lending.

A partner in Ogier's finance practice in Asia, based in Hong Kong, David became Ogier's youngest partner at the age of 33 when he joined the firm in 2018, and has been named in *Asian Legal Business*' prestigious Top 40 Under 40, a list of the outstanding lawyers in Asia under the age of 40, across private practice and in-house roles.

David has worked in Asia, London and Paris. He is known for his technical ability and hands-on approach in his specialist fields of acquisition finance, fund finance, margin lending and general corporate lending transactions.

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Fabien Debroise has particular expertise in syndicated lending and leveraged acquisition finance, debt restructuring and insolvency. He has considerable experience in capital markets matters (including the issuance and listing of debt instruments), regulatory matters and commercial litigation.

A partner at Ogier, the first offshore law firm to establish in Luxembourg, Fabien leads the wide-ranging practice of the firm's Luxembourg Banking & Finance team.

Fabien is fluent in French, English and German.

A recognised thought leader on matters of Luxembourg law, Fabien is praised by *The Legal 500* for acquisition financing, debt capital markets work and refinancing for borrowers and lenders.

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